BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN H. HOLTKE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,759
HOLY CROSS SCHOOL	)	
Respondent	)	
AND	)	
	)	
PREFERRED PROFESSIONAL INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the August 23, 2012, Award [on Remand] by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on January 16, 2013.

APPEARANCES

Denise E. Tomasic, of Kansas City, Kansas, appeared for the claimant. Lara Q. Plaisance, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The SALJ found claimant to be entitled to an 11.5 percent whole body functional impairment and an 80.8 percent permanent partial general (work) disability. He also found claimant to be entitled to reimbursement for and/or payment of all authorized medical bills, future medical expenses related to the injury and an unauthorized medical allowance up to the statutory maximum. Finally, he opined that the social security offset does not apply in this matter.

Respondent argues first that the SALJ failed to address the issue of whether claimant met with accidental injury arising out of and in the course of his employment, an issue that was on remand from the Board. Second, respondent argues that claimant failed to establish that he sustained an accidental injury arising out of and in the course of his employment and therefore all benefits awarded by the SALJ should be denied. In the event the Board finds claimant has a compensable injury, the award should be no more than a 50 percent work disability and should be reduced pursuant to K.S.A. 44-501(h) and K.S.A. 44-510f(a)(4)(b). Respondent contends that it never had notice of a work-related injury. Therefore, all of claimant's medical treatment was provided with physicians of his own choice and not with the authorization of respondent.

Claimant argues that his back injury arose out of and in the course of his employment with respondent during the performance of his regular duties as a school custodian. Claimant further argues that respondent is not entitled to an offset pursuant to K.S.A. 44-501(h), because claimant retired from the banking industry and had been collecting social security retirement benefits for a number of years prior to the work-related injury. Claimant contends that, at most, respondent is entitled to the claimed credit for retirement benefits that commenced after the accident and are currently being paid by respondent. Finally, claimant argues that the average of his wage loss and task loss results in a 83.5 to 89 percent work disability, which leaves him entitled to the statutory maximum payable for work disability of $100,000.

The issues are as follows:

1. Did claimant meet with personal injury by accident arising out of and in the course of his employment with respondent?

2. Did claimant provide timely notice of the accident?

3. Is claimant entitled to future medical care and treatment?

4. Is claimant entitled to the unauthorized medical allowance? Was the medical treatment provided claimant authorized or unauthorized medical care?

5. Is respondent entitled to a credit against any benefits awarded for claimant's receipt of social security retirement benefits and employer-paid retirement benefits?

6. What is the nature and extent of claimant's injuries and disability, if any?

FINDINGS OF FACT

Claimant was born February 16, 1937. He began working for respondent, Holy Cross Catholic School, on July 15, 2001, predominately performing custodial work and rebuilding desks, chairs and tables.

Claimant claims injury to his back while working for respondent. As part of his job duties, claimant was required to set up and take down tables that have fold-up legs. Claimant testified that on March 26, 2010, he was putting away tables when one slipped. As the table began to fall, claimant attempted to catch it and something popped in his back. Both the table and claimant fell to the floor. Claimant lay on the floor for a while before he was able to get up.

Claimant testified that after the accident, he attempted to report what happened to Ms. Mary Jo Gates, the principal, but she was not available that day. Instead, claimant reported the incident to Anita Lemmon, the school secretary, and asked her to pass the information on to Ms. Gates. Claimant also tried to contact parish manager Mark Engen, but could not get a hold of him.

Shortly after the alleged accident, claimant began treatment with board certified neurological surgeon, Steven J. Hess, M.D. Claimant complained of severe back pain that radiated down into his buttocks and right leg, into his right foot. He testified that any movement caused him pain. The March 29, 2010 office note indicated acute lumbar back pain which "occurred without any known injury".[1] Dr. Hess performed surgery consisting of a right L4-5 laminotomy/diskectomy on April 15, 2010. Claimant did not work more than a couple of days between the date of the accident and the day of the surgery.

Claimant testified that two weeks after the surgery, he was in contact with Mr. Engen and filled him in on what was going on. Claimant never spoke with Ms. Gates. Claimant was released from surgery and returned to work on July 1, 2010. He testified that Dr. Hess released him to light duty to perform basic functions around the office. He was restricted from performing his custodial duties, and was not allowed to lift anything over 50 pounds. Claimant was not allowed to return to work for respondent, and was not offered accommodated work. He later found out that his position had been filled.

Claimant's complaints at the time of the regular hearing were soreness and stiffness in his back and problems with his right leg due to weakness. Claimant admitted to having back problems in 2007. He didn't remember how he hurt his back then, but he did see Dr. Postma and Dr. Holladay. He denied ongoing back problems between 2007 and 2010.[2] Claimant testified that his back pain, after the 2010 accident, was much worse than it was in 2007. In 2007 his back felt more like it was strained, or like he had pulled a muscle. In 2010, he had sharp pain. He did not have leg pain in 2007. Claimant last worked for respondent on April 7, 2010. He has not worked anywhere since.

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[1] R.H. Trans. (Jul. 19, 2011), Resp. Ex. C at 5.

[2] R.H. Trans. (Jul. 19, 2011) at 41-42.

When claimant began working for respondent, he was already receiving social security benefits. The job with respondent was intended to supplement his social security income.[3] Claimant testified that he is entitled to medicare benefits. He also testified that the medical bills he has accrued are due to the treatment of his back injury.

Claimant indicated that the physical requirements of the job with respondent were office-type work and standing, walking, lifting, carrying, pushing, pulling, bending, stooping, kneeling, twisting, turning and lifting more than 50 pounds.[4]

Claimant testified that when he went for medical attention, he skirted the issue of his back being work-related because he didn't want respondent's insurance premiums to go up. He had no problem with respondent knowing he was injured.[5]

Mark Engen testified that, as parish manager for Church of the Holy Cross, his job was to take care of the finances and facilities with some responsibilities in human resources. He directly supervised the maintenance staff at the church and the school, and also the bookkeeper, Marilyn Sell. He has been parish manager since 2003.

Mr. Engen testified that claimant worked as a custodian for the school, progressing from a night custodian to the day custodian. The requirements of the job included being able to lift up to 50 pounds. Claimant had to work alone from 7:30 a.m. to 2:00 p.m. He had assistance from another maintenance man from 2:00 p.m. to 10:00 p.m.

Mr. Engen was aware claimant was receiving chiropractic treatment as early as March 29, 2010. However, he did not become aware that claimant was claiming a work-related accident until receiving a letter from claimant's attorney on or about July 28, 2010. Before that time, claimant had not related his back complaints to any activities at work. Mr. Engen was aware claimant had suffered back pain off and on for several years.

An Employers Report of Accident was prepared by Mr. Engen after he received a letter from claimant's attorney. That form was prepared on August 16, 2010, and indicated a date of accident on April 1, 2010, with the injury to claimant's back from lifting tables. Mr. Engen was also provided medical information prior to claimants back surgery.

Mr. Engen was aware of claimant's restrictions from Dr. Hess of no lifting over 50 pounds. He knew that effective July 16, 2010, claimant would not be able to perform his work duties and would need to be off intermittently until October 2010. Mr. Engen testified that he thought a light duty restriction meant claimant could work as tolerated.

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[3] R.H. Trans. (Jul. 19, 2011) at 32.

[4] R.H. Trans. (Jul. 19, 2011) at 36.

[5] R.H. Trans. (Jul. 19, 2011) at 45-46.

Mr. Engen was aware of claimant's back injury, but claimant never told him it was work-related. Mr. Engen believed it was from claimant's activities away from work. He did let claimant know that the archdiocese had workers compensation insurance should he need to file a claim.

Mr. Engen testified that the procedure for reporting a work injury is for the employee to report it to the principal or the nurse. After that the archdiocese is contacted and an incident report is filled out and, depending on the severity of the injury, medical attention is sought.[6] An incident report was not filled out for the claimant. Mr. Engen questioned Ms. Lemmon about claimant's back complaints. She stated she was unaware of any specific incident that caused claimant's back injury.

Claimant was considered to be a reliable and honest employee who did good work. Mr. Engen testified that he had daily contact with claimant through a combination of phone calls and emails. He did not actually observe claimant performing his work duties.

Claimant's fringe benefits were terminated on October 31, 2010, after claimant failed to notify respondent that he wanted to extend his FMLA. The assumption was that claimant has resigned after he had approached Kathleen Thomas about receiving lay retirement benefits.

Mr. Engen testified that Dr. Postma and Dr. Hess' notes do not accurately describe claimant's job duties when they say it is mostly sedentary and supervisory.

Anita Lemmon has worked as school secretary for Holy Cross School for 15 years. Ms. Lemmon was in contact with claimant on a daily basis during his employment with the school. Ms. Lemmon testified that the first she learned of claimant having problems with his back was at the end of March. Claimant reported to her that he was leaving the building to go see a chiropractor for his back. Claimant told her he thought his problems might be from lifting the tables in the cafeteria.[7] She testified that claimant appeared to be in pain as he was standing at her desk when they had this conversation.

Ms. Lemmon didn't talk with claimant at work after this conversation in March, but was aware that he continued to have problems with his back and had to have surgery. Ms. Lemmon and claimant have been neighbors for 24 years and the two had conversations about his back and his treatment. Ms. Lemmon had no conversations with Mr. Engen or any other employee of respondent about claimant's back until the workers compensation claim letter arrived. She acknowledged her job duties did not include any involvement with

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[6] Engen Depo. at 28.

[7] Lemmon Depo. at 5.

workers compensation claims. Ms. Lemmon did have conversations with the school principal about the need to replace claimant at the time he was having the surgery. She did not recall any conversation regarding how claimant was injured or whether it happened at work.

When the notice for workers compensation arrived in the mail, Ms. Lemmon put it in Mr. Engen's mailbox. When claimant started to miss work it was decided that a replacement was needed to make sure that the work got done.

Mary Jo Gates was the former principal for Holy Cross School. During her employment with the school she also held positions as a teacher and vice principal. She was claimant's indirect supervisor. She saw him on a daily basis and had the opportunity to talk with him about upcoming events and tasks that needed to be done.

Ms. Gates indicated that it was March or probably April 2010 when she became aware that claimant was experiencing problems with his back. Ms. Gates testified that her secretary informed her claimant was having back surgery in April 2010. She was not told the reason claimant needed surgery and she did not ask. It wasn't until claimant filed his workers compensation claim that she became aware that he was alleging a work injury was the cause of his back problems. Ms. Gates was contacted by Holly Sampson from the insurance company, who requested an incident report. Mark Engen had already been called for the report and stated that a report did not exist because he didn't know anything about claimant's claim.

Ms. Gates considered claimant to be a good and reliable worker, but there was an occasion where she discussed with Mr. Engen the fact that she was not completely satisfied with claimant's work. She did not put this concern in writing. She was aware of claimant's other health conditions and the fact that he would have to leave work for doctor's visits. There was no indication that those health problems were related to claimant's work.

Claimant continued to receive full wages for part of the summer after he was injured in March of 2010. He testified that he was notified in July 2010 that his wages were being discontinued. He sought legal counsel at the end of July 2010 when his benefits ended. Claimant indicated that before that he had no reason to file a workers compensation claim because his health insurance was paying for his medical bills.[8]

Claimant testified that he told Anita Lemmon that he injured his back, because Ms. Gates was not in her office and he needed to report it to someone, especially since he was leaving before the end of his shift.[9] He denies saying anything about going to see a

[8] Cont. R.H. Trans. (July 26, 2011) at 7.

[9] Cont. R.H. Trans. (July 26, 2011) at 8.

chiropractor. Claimant admits to having back problems in 2007, but he didn't have surgery until after the 2010 on-the-job injury.

Claimant didn't know why Dr. Postma, Dr. Snow, Dr. Hess and Dr. Laughlin had in their reports that his job was mostly sedentary desk work. He denied telling the doctors that he felt a pain in his back after getting up from a computer. He doesn't know where that idea came from. Claimant admits that he didn't discuss the incident of the table falling with the doctors.[10] Claimant did discuss the incident involving the table with Dr. Prostic. It was not claimant's intention to collect workers compensation benefits when he reported his accident to Mark Engen.

Claimant is currently receiving $1,400 a month in social security retirement benefits and $200 a month in retirement benefits from Holy Cross and the diocese.[11] Claimant was receiving the social security before the accident and began receiving the retirement benefit from Holy Cross and the diocese after the claimed accident.

George Postma, M.D., is board certified physician in general internal medicine. Dr. Postma does not typically treat patients with workers compensation injuries and is not routinely an authorized treating physician. Only occasionally will he treat someone for a work-related injury after he has evaluated them. Dr. Postma testified that claimant has been his patient for around 10 years.

On March 26, 2010, Dr. Postma's office received a phone call from claimant's wife indicating claimant began having pain in his back after turning to get up from a computer. A muscle relaxer and pain pill were prescribed and an appointment was made for claimant to come into the office on March 29, 2010. At this appointment, claimant displayed pain in his back on the right side more than the left, that went into the right buttock and down the leg. Claimant never clearly indicated how he hurt his back. One minute it was after moving away from the computer and then it was from moving 125 pound tables. Dr. Postma testified that, in retrospect, it was his sense that claimant injured his back moving the tables at work.[12] The March 29 medical report stated "this condition occurred without any known injury".[13] The report also states that on Wednesday, claimant got out of bed and had an increase in pain. Dr. Postma acknowledged an accurate description of how a patient was injured would be important. Dr. Postma agreed that claimant did not voice

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[10] Cont. R.H. Trans. (July 26, 2011) at 16-17.

[11] Cont. R.H. Trans. (July 26, 2011) at 21.

[12] Postma Depo. at 10, 24.

[13] Postma Depo., Ex. 1 at 5.

complaints of chronic low back pain between 2007 and 2010.[14] A Health Insurance claim form indicating dates of service on March 29 and April 16, 2010, stated the condition was not related to claimant's employment.

Claimant met with Dr. Steven Hess, a neurosurgeon, for an evaluation on April 2, 2010, with complaints of a week long history of excruciating pain in his back and down his right leg, just below the knee. Claimant also reported back problems off and on for the past two to three years, which lasted for six months, with intermittent flare-ups. Nowhere on the questionnaire that claimant filled out did it indicate claimant's problems were work-related. If claimant had reported that his problems were related to his work, Dr. Hess would have included that in his report. Dr. Hess opined that one can rupture a disc in their sleep or any time one lifts, bends, or stoops or does anything else.[15]

Dr. Hess examined claimant finding severe right L4 pain with numbness and weakness. Dr. Hess gave claimant the option of epidural injections, but claimant opted for a microdiskectomy. Dr. Hess performed surgery on April 15, 2010. Dr. Hess met with claimant again May 10, 2010, for follow-up and again on June 21, 2010.

Dr. Hess filled out FMLA paperwork for claimant on July 16, 2010, indicating that claimant was unable to lift 50 pounds or more, which was an essential function of his job. He did not restrict claimant from being able to perform work of any kind. Claimant was released from Dr. Hess' care on October 28, 2010.

The first time that Dr. Hess learned claimant was pursuing a workers compensation claim was on March 21, 2011. He had no idea how claimant's injury occurred or what happened. Dr. Hess assigned claimant a 10 percent permanent partial functional impairment, pursuant to the 4th edition of the AMA *Guides*.[16]

Dr. Hess stated that claimant has a five to seven percent lifetime risk of rupturing the disc in his back again or developing some new problems. He explained that those who have ruptured one disc have a higher chance of rupturing other disks. Dr. Hess testified that claimant's MRI from 2007 was different from his MRI in 2010 in that the changes were enough to advance claimant's situation from no symptoms to leg drop, pain, weakness and numbness. He opined that claimant's prominent disc herniation from 2007 could have caused the symptoms similar to what claimant had in 2010, but his strength and reflexes in 2007 were normal.

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[14] Postma Depo. at 21.

[15] Hess Depo. at 11.

[16] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

Dr. Hess declined to say that claimant sustained a new injury and instead testified that "something happened to make it symptomatic. The disc herniation changed or came out again. . . I very strongly would feel that that herniation we saw was pretty new and that something set if off."[17]

At the request of his attorney, claimant met with board certified orthopedic surgeon, Edward J. Prostic, M.D., for an examination on March 7, 2011. Claimant reported an injury during his work as a custodian from March 24, 2010 through April 7, 2010. Claimant had complaints of frequent pain across his low back, just below the waist, with intermittent radiation down the right leg (anterolateral calf). Claimant indicated that his symptoms were worse with sitting, standing, walking, bending, squatting, twisting, lifting, pushing, pulling and inclement weather. Claimant, on occasion, favors his right leg when walking and has difficulty with balance at times. Dr. Prostic noted that claimant had an episode of low back pain three years before this examination and, after medical attention, made a complete recovery.

Dr. Prostic examined claimant and opined claimant was post operative disc excision with episodic sciatica and continuing mechanical low back pain. Claimant was overweight, out of condition and needed work restrictions. Dr. Prostic opined that claimant sustained injury to his low back, resulting in an extruded disc at L4-5 on the right, which was improved with surgery. He noted that claimant continued to have significant low back pain and stiffness and occasional radiculopathy. Dr. Prostic recommended claimant lose weight and participate in a rehabilitative exercise program.

Dr. Prostic opined that claimant could return to light duty and was instructed to avoid frequent bending or twisting at the waist, forceful pushing or pulling, no more than minimal use of vibrating equipment or captive positioning. He went on to rate claimant with a 18 percent permanent partial impairment to the body as a whole based on the Range of Motion Model of the AMA *Guides*, 4th edition.

Dr. Prostic opined that out of 9 tasks performed by claimant over the last 15 years, claimant could no longer perform 7 for a 78 percent task loss.[18]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[19]

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[17] Hess Depo. at 33.

[18] Prostic Depo. at 12.

[19] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[20]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[21]

This matter originally came before the Board on an appeal from the January 27, 2012, Award of SALJ Jerry Shelor. SALJ Shelor denied claimant benefits after finding claimant failed to provide respondent with timely notice of his alleged accident. In its decision rendered June 28, 2012, the majority of the Board reversed SALJ Shelor, finding that notice had been given to Ms. Lemmon who discussed the incident with Ms. Gates and/or the parish manager, Mr. Engen. The Board also found notice was provided to Mr. Engen within the time limits statutorily required. A strong dissent by one Board Member protested the majorities findings. The dissent noted Ms. Lemmon was not a supervisor over claimant and had no authority to accept notice of a work related injury. There also was no evidence that Ms. Lemmon imparted any knowledge of a work related injury to respondent.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[22]

The dissent in the Board's Order noted that claimant testified he did not talk about his back injury to Mr. Engen until after having surgery on April 15, 2010. Thus, the dissent noted, it could hardly be concluded, even from claimant's testimony, that he notified Mr. Engen of his accident within the required ten-day period.

The Board's decision was appealed to the Kansas Court of Appeals. The claimant/appellee filed a motion for involuntary dismissal arguing the Board's Order was not a final order. The Court agreed, dismissing the appeal on August 13, 2012, "as interlocutory".

The matter was then returned to the SALJ and an Award was issued on August 23, 2012, which is the subject of this appeal. Respondent raised several issues. In respondent's brief, one issue dealt with a lack of notice, coupled with an objection to claimant's request for payment of his medical bills as authorized medical treatment. At oral

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[20] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[21] K.S.A. 2009 Supp. 44-501(a).

[22] K.S.A. 44-520.

argument to the Board, claimant asserted the defense that the Board's prior decision constituted the "law of the case" on the issue of timely notice.

The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate review, sec. 605 in the following manner:

> The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issues, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.

The Kansas Supreme Court, again discussing the law of the case, stated in *Connell:*[23]

> The doctrine of law of the case, as applied to the effect of previous rulings on later action of the trial court, is a salutary and utilitarian rule to be applied to pretrial orders, but it is not to be considered as a limitation on the power of a trial court to do justice or correct prior rulings which are clearly erroneous. A trial court has inherent power to review its own proceedings to correct errors or prevent injustices. The power to reconsider a ruling in a case resides in the trial court until a final judgment or decree is issued.

The Board is not the initial trial court in workers compensation matters. It does have the responsibility to provide de novo review of all ALJ and SALJ actions. It most certainly has the power and responsibility to review, and if necessary, correct its own prior rulings on issues brought before it. As noted by the Supreme Court in *State v. Collier*,[24] ". . . the law of the case rule is not inflexibly applied to require a court to blindly reiterate a ruling that is clearly erroneous . . ."

Claimant argues the Board cannot modify its earlier decision based upon the law of the case. The Kansas Supreme Court, in *State v Finical*[25], stated: "We repeatedly have held that when an appealable order is not appealed, it becomes the law of the case." However, here, the matter was taken to the Court of Appeals, which immediately dismissed the matter, finding the Order of the Board on the issue of timely notice to be an interlocutory order and not ripe for appellate review. Thus, the Board finds it is proper for respondent to again argue the timeliness of the notice.

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[23] *Connell v. State Highway Commission*, 192 Kan. 371, 376, 388 P.2d 830 (1964).

[24] *State v. Collier*, 263 Kan. 629, 632, 952 P.2d 1326 (1998).

[25] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

Here claimant alleges he told Ms. Lemmon of his accident while lifting the table. There is no indication in this record that Ms. Lemmon advised either Mr. Engen or Ms. Gates before they received the attorney letter in July, that claimant's back problems were from a work related accident. Ms. Lemmon acknowledged she had nothing to do with workers compensation matters. Neither Mr. Engen nor Ms. Gates were advised by claimant of the alleged work-related accident with the table until receipt of claimant's attorney's letter.

The record contains several alternate explanations for claimant's injuries. Dr. Postma's office was initially informed by claimant's wife that he injured his back after turning to get up from a computer. Dr. Hess' records over a several month period fail to identify a work-related element to claimant's injuries. He was not advised that claimant was pursing a work-related claim until March 21, 2011.

Claimant can only prove, from this record, that he advised Ms. Lemmon of the problems associated with lifting the table, and no one else. Notice to Ms. Lemmon does not constitute notice to respondent of a work-related accident. The Board finds that claimant has failed to satisfy the requirements of K.S.A. 44-520, and his request for workers compensation benefits should be denied. The Award of the SALJ is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed as claimant failed to provide respondent with timely notice of his alleged accident. The Award of SALJ Jerry Shelor is reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated August 23, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

The undersigned Board member joins with the majority of my colleagues. However, this Board member feels it is necessary to specifically address the issue raised in the dissenting opinion, that is, the applicability of the doctrine of *res judicata* to this claim. The goals of *res judicata*, and other related doctrines such as collateral estoppel and law of the case, are important because they strive to prevent the litigation of issues already decided and thus to encourage judicial economy.

Unquestionably, the doctrine of *res judicata* may apply to a workers compensation claim as well as a court judgment.[26] But to apply *res judicata* to respondent in this claim effectively deprives respondent of its statutory right to secure appellate court review of the substantive issue of whether claimant timely provided respondent with notice as required by K.S.A. 44-520.

In the Order dated January 27, 2012, the Board decided the notice issue in favor of claimant and remanded the claim to SALJ Shelor to decide the issues which were not addressed in Judge Shelor's original award. Respondent timely filed an appeal to the Kansas Court of Appeals from the Board's January 27, 2012, Order. Claimant filed with

[26] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 259, 211 P.3d 175 (2009), *rev. denied* 290 Kan. 1095 (2010). See *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 519 P.2d 1190 (1973).

the Court a motion to involuntarily dismiss the appeal, which was granted and the "appeal [was] dismissed as interlocutory."

The dissenting opinion states the Board's first Order, which found claimant did provide respondent with timely notice was ". . . a final not interlocutory decision."

However, the notion that the Board's first Order was final, not interlocutory, does not appear to take into account the Court of Appeals' express finding in its order for involuntary dismissal that the Board's first Order was interlocutory in nature. Arguably, the Court's Order dismissing the appeal is *res judicata* regarding the finality of the first Board Order.

K.S.A. 44-556(a), provides: "[A]ny party may appeal from a final order of the board by filing an appeal with the court of appeals within 30 days of the date of the final order." If *res judicata* is applied so that the Board's first finding regarding notice cannot be challenged, then respondent's statutory right to have the Court of Appeals and, potentially the Kansas Supreme Court, review the issue is lost.

The Court of Appeals found the Board's initial order was interlocutory because that initial order remanded the claim to the SALJ for further proceedings. That finding by the Court of Appeals is binding on the parties and the Board. The parties have rights to appeal final orders to the Appellate Court from the Board. To apply *res judicata* against respondent would serve to deprive respondent of appellate court review of the issue of notice contained in an appealable Board order.

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member dissents from the finding of the majority that the Board should reconsider the issue of timely notice. Since the January 27, 2012 Order, wherein a majority of the Board determined claimant provided timely notice, the record remains the same. The only change in circumstance since the January 27, 2012, Order is that two of five Board Members have changed. There is nothing to indicate the Board Majority in the January 27, 2012, Order erred in finding that claimant gave timely notice.

The Board's decision that claimant gave notice was an Award and, therefore, a final, not interlocutory decision. The issue of timely notice should not be revisited, as it is *res judicata*. In *Scheidt*,[27] Kansas Court of Appeals stated:

> A workers'-compensation award is in most respects like a court judgment and subject to res judicata: issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute. See *Randall v. Pepsi–Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973); *Bazil v. Detroit Diesel Central Remanufacturing*, 2008 WL 5401467, at *5 (Kan.App.2008) (unpublished opinion).

Reconsidering an issue, where the facts have not changed, and there is no clear indication the majority erred in fact or law, promotes judicial inefficiency. The majority's ruling is an invitation to parties in future cases to re-litigate issues already decided. The undersigned Board Member fears that is an invitation many parties will eagerly accept.

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BOARD MEMBER

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[27] *Scheidt v. Teakwood Cabinet & Fixture, Inc.,* 42 Kan. App. 259, 211 P.3d 175 (2009).